LIBRARY
SUPREME COURT, U. S.

Court, U.S.
JUL 16 1970
E. ROBERT SEAVER, CLERK

Nos. 410

In the Supreme Court of the United States

OCTOBER TERM, 1969

CHICAGO & EASTERN ILLINOIS RAILROAD, et al.,

Appellants,

vs.

CITY OF CHICAGO, et al.,

Appellees.

On Appeal From The United States District Court for the Northern District Of Illinois.

JURISDICTIONAL STATEMENT

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
KEITH F. BODE
PETER A. FLYNN
135 South La Salle Street
Chicago, Illinois 60603
Attorneys for Appellant
Chicago & Eastern Illinois
Railroad Company

July 15, 1970

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Statutes and Regulations Involved	2
Questions Presented	3
Statement	3
Proceedings Before the Interstate Commerce Commission	3
Proceedings in the District Court	4
The Questions Are Substantial	6
I. The District Court's Decision Encourages Technical Attacks on Commission Orders. Furthermore, Its Failure to Articulate Standards For "Proper" Notice Provides Additional Encouragement For Such Attacks, And Leaves An Important Question of Statutory Interpretation Unsettled	7
II. The Decision of the District Court, However Interpreted, Is Wrong On The Merits	10
Conclusion	14
Appendix A (District Court Order of February 5, 1970)	1a
Appendix B (District Court Order of March 19, 1970)	3a
Appendix C (Opinion and Orders of the Interstate Commerce Commission)	9a

PAGE

Appendix D (Notice of Appeal) 36a

Appendix E (Statutes and Regulations Involved) .. 38a

Appendix F (Map Showing Routes of Trains Involved) 46a

CITATIONS

Cases

Ayrshire Collieries Corp. v. United States, 331 U.S. 132 (1947) 13

Bass v. United States, 163 F.Supp. 1 (W.D. Va. 1958), *aff'd*, 358 U.S. 333 (1959) 10

Chicago & E.I.R.Co. Discontinuance of Trains, 331 I.C.C. 447 (1968) 4, 8

Chicago & E. Ill. R.R. v. Illinois Cent. R.R., 261 F. Supp. 289 (N.D. Ill. 1966) 10

City of Chicago v. United States, 294 F.Supp. 1103 (N.D. Ill. 1969), *rev'd*, 396 U.S. 162 (1969) 5

City of Chicago v. United States, 396 U.S. 162 (1969) 2, 5

Illinois Cent. R.R. v. United States, 263 F.Supp. 421 (N.D. Ill. 1966), *aff'd*, 385 U.S. 457 (1967) 11

Louisville & N.R.Co. Discontinuance of Trains, 333 I.C.C. 720 (1968) 4

McCracken v. United States, 47 F.Supp. 444 (D. Ore. 1942) 13

Missouri Pac. R. Co. Discontinuance of Trains, 320 I.C.C. 383 (1964) 8

Nat'l Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111 (1944) 10

PAGE

Shields v. Utah Idaho Cent. R.R., 305 U.S. 177 (1938) 10

Southern Pac. Co. Discontinuance of Trains, 317 I.C.C. 519 (1962) 8

Southern Ry. v. North Carolina, 376 U.S. 93 (1964) 2, 6

State of Georgia v. United States, 156 F.Supp. 711 (N.D. Ga. 1957), *aff'd*, 356 U.S. 273 (1958) 10

State of Montana v. United States, 202 F.Supp. 660 (D. Mont. 1962) 13

State of New York v. United States, 299 F.Supp. 989 (N.D. N.Y. 1969), *aff'd*, 396 U.S. 281 (1970) 13

Virginian Ry. v. United States, 272 U.S. 658 (1926) 11

Statutes

28 U.S.C. §1253 2

28 U.S.C. §1336 2

28 U.S.C. §2101(b) 2

28 U.S.C. §2325 ..... 2, 13

49 U.S.C. §13a(1) ..... *passim*

Regulations

49 C.F.R. Part 1122 (1970 Ed.) 2

49 C.F.R. §1122.5(e) (1970 Ed.) 8

49 C.F.R. §1122.5(j) (1970 Ed.) 8, 10

In the
Supreme Court of the United States

OCTOBER TERM, 1969

Nos.

CHICAGO & EASTERN ILLINOIS RAILROAD, et al.,

Appellants,

vs.

CITY OF CHICAGO, et al.,

Appellees.

On Appeal From The United States District Court for the Northern District Of Illinois.

JURISDICTIONAL STATEMENT

Appellant Chicago & Eastern Illinois Railroad Company ("C&EI") appeals from the judgment of the United States District Court for the Northern District of Illinois, setting aside an order of the Interstate Commerce Commission. The judgment was originally entered on February 5, 1970 but, on reconsideration, was vacated, amended, and modified on March 19, 1970. C&EI submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below[1]

The opinion of the District Court is contained in its orders of February 5, 1970 and March 19, 1970 (both unreported), copies of which are attached hereto as Appendices A and B respectively. Copies of the Interstate Commerce Commission's report and order authorizing discontinuance, reported in 331 I.C.C. 447, and of its unreported order denying reconsideration, are attached hereto as Appendix C.

Jurisdiction

Appellees brought this suit under 28 U.S.C. §1336, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court, originally entered on February 5, 1970, was vacated, amended, and modified on reconsideration on March 19, 1970; C&EI filed its notice of appeal in the District Court on April 17, 1970. A copy of C&EI's notice of appeal is attached hereto as Appendix D. The jurisdiction of the Supreme Court of the United States to review the judgment on direct appeal is conferred by 28 U.S.C. §§1253, 2101(b), and 2325, and is sustained by *Southern Ry.* v. *North Carolina*, 376 U.S. 93 (1964), and *City of Chicago* v. *United States*, 396 U.S. 162 (1969).

Statutes and Regulations Involved

Section 13a(1) of the Interstate Commerce Act, 49 U.S.C. §13a(1); the regulations of the Interstate Commerce Commission promulgated thereunder, 49 C.F.R. Part 1122 (1970 Ed.); and Section 2325 of the Judicial Code, 28 U.S.C. §2325, are set forth in Appendix E hereto.

---

[1] This case is now before this Court for the second time. See p. 5, *infra*.

Questions Presented

1. Where a rail carrier, under Section 13a(1) of the Interstate Commerce Act, 49 U.S.C. §13a(1), posts notices of a proposed discontinuance at all points along the route of the trains to be discontinued, and the Interstate Commerce Commission (in accordance with its consistent construction of the statute) expressly finds that such notice was proper and sufficient, may the District Court—without articulating the basis for its decision or the standards to be applied in the future and without considering the merits of the case—summarily reverse the Commission's interpretation of the statute, require the Commission to reopen its investigation and consolidate the case with one involving entirely different trains, and require the carrier to post notices in states it does not serve?

2. May the District Court summarily vacate an order of the Interstate Commerce Commission on grounds of allegedly insufficient notice, without considering the merits of that order, where the claimed insufficiency is not a jurisdictional defect and there is no showing that it prejudiced any party in any way?

Statement

Proceedings Before the Interstate Commerce Commission

On August 31, 1967, C&EI filed with the Interstate Commerce Commission, posted at all points served by the trains and in each car of the trains, and mailed to the Governors of Indiana and Illinois, the statutory notice of its intent to discontinue its interstate passenger trains Nos. 93 and 54, operating (one in each direction) between Chicago, Illinois and Evansville, Indiana. After an investigation and full hearings, the Commission concluded that the trains

should be discontinued and terminated its investigation. *Chicago & E.I.R.Co. Discontinuance of Trains*, 331 I.C.C. 447 (1968).[2] Appellees (the great majority of whom were parties to the Commission proceeding) then sought reconsideration, arguing for the first time that C&EI's failure to post notices in Kentucky, Tennessee, Georgia and Alabama —states served not by C&EI, but by trains of another railroad, the Louisville & Nashville ("L&N"), which connect with C&EI's trains at Evansville—deprived the Commission of jurisdiction. On May 15, 1968, the Commission rejected that argument (Appendix C, p. 35a), finding that C&EI "'gave the proper notice required,'" and denied reconsideration. On May 27, 1968, appellees commenced this action in the District Court.[3]

Proceedings in the District Court

The case in the court below, which never reached the merits, turned upon two motions, both argued on November 4, 1968: appellees' motion for summary judgment, which requested the District Court to remand the case to

---

[2] The trains were accordingly discontinued on February 2, 1968, and have not operated since that time.

[3] Four months later, the Commission authorized discontinuance of two L&N trains operating between Cincinnati, Ohio and New Orleans, Louisiana, *Louisville & N.R.Co. Discontinuance of Trains*, 333 I.C.C. 720 (1968), and the Tennessee Public Service Commission, joined by appellees in the instant case, brought suit in the court below to review that order. The two cases were not consolidated (despite appellees' requests) until the District Court's order of March 19, 1970. For clarity, the instant case will occasionally be referred to hereafter as "the C&EI case," and its companion as "the L&N case." It should be noted that the trains involved in the L&N case do not even intersect with those involved here.

the Commission with instructions to dismiss for want of jurisdiction because of C&EI's allegedly insufficient notice, and C&EI's motion to dismiss the case on the ground that the Commission's order was not subject to judicial review.

On January 8, 1969, the District Court granted C&EI's motion to dismiss. *City of Chicago* v. *United States*, 294 F. Supp. 1103 (N.D. Ill. 1969). This Court reversed on direct appeal, in an opinion holding only that Commission orders discontinuing investigations under Section 13a(1) are judicially reviewable, and remanded the case to the District Court for further proceedings. *City of Chicago* v. *United States*, 396 U.S. 162 (1969). Without hearing argument and without explanation, the District Court thereupon issued an order (Appendix A) "that both cases numbered 68 C 956 [the C&EI case] and 68 C 1666 [the L&N case] be remanded to the Interstate Commerce Commission for further hearings."[4] It did not specify the nature of the "further hearings."

All parties sought reconsideration or clarification of that order. On March 19, 1970 the District Court—still without hearing argument—granted reconsideration, vacated its first order, and entered a new order consolidating the C&EI and L&N cases, requiring the Commission to consolidate the cases on remand, vacating the Commission's orders in both cases (which it had omitted to do in its first

---

[4] The order was apparently based upon appellees' "Motion on Mandate of the Supreme Court," filed on January 7, 1970, which requested reinstatement of a temporary restraining order (dissolved a year previously) in the L&N case and sought remand of the L&N case to the Commission "upon grant of [appellees'] motion for summary judgment in [the C&EI case]." Both this order and that of March 19, 1970 purported to be in compliance with this Court's mandate on remand; but neither the mandate nor this Court's opinion could be said even to suggest the action taken by the District Court.

order), and remanding both cases to the Commission "for further proceedings in accordance with the statutes so made and provided." (Appendix B, p. 8a.) Again the court failed to specify the nature of the "further proceedings;" it did not even specify the statutes to which it referred. Its sole explanation for the order (*Id.*, p. 7a) was that in the C&EI case "the public did not receive adequate notice from the railroads or of the I.C.C. proceedings," and that remand of the C&EI case required remand of the L&N case because "only in a consolidated proceeding can a just and fair decision be reached." The court did not hold that the allegedly inadequate notice was a jurisdictional defect or that any party was in any way prejudiced thereby, nor did it suggest that the Commission's orders in either case were wrong on the merits. In neither case did the court ever entertain briefs or argument on the merits.

This appeal followed.

The Questions Are Substantial

As this Court recognized in *Southern Ry.* v. *North Carolina*, 376 U.S. 93, 100-04 (1964), Congress intended Section 13a of the Interstate Commerce Act, 49 U.S.C. §13a, as a partial remedy for a steadily worsening railroad situation. The eventual solution to the serious problems of rail passenger service, whatever form it may take, cannot be advanced by the decision below. The District Court's ruling, unsupportable on the merits, can only encourage attempts to set aside Interstate Commerce Commission orders on technical and uncertain grounds of "notice," grounds unrelated to the purpose of Section 13a, the merits of the Commission orders, or the fairness of the Commission hearings. Further, the decision below violates basic principles of judicial review by its sum-

mary rejection of the Commission's consistent interpretation of a technical provision of the Interstate Commerce Act, and fails either to set forth the reason for that rejection or to outline criteria for the conduct of future proceedings in this case or the interpretation of Section 13a(1) in other cases. The effect of the decision is to require every carrier seeking relief under Section 13a(1) to proceed at hazard, guessing at what notice is required and constantly facing the prospect of reversal of the Commission's decision, regardless of its merits, on the technical ground that notice should have been posted at additional locations. That cannot have been what Congress intended.

I.

The District Court's Decision Encourages Technical Attacks on Commission Orders. Furthermore, Its Failure to Articulate Standards For "Proper" Notice Provides Additional Encouragement For Such Attacks, And Leaves An Important Question of Statutory Interpretation Unsettled.

This case originally involved two trains (one in each direction), operated by one carrier (C&EI) between Chicago and Evansville, Indiana. Appellant, appellees, and the Commission so treated it. But having lost on the merits before the Commission, appellees, in their Petition for Reconsideration, sought to sidetrack the case by arguing—for the first time—that two other trains were involved, and that C&EI's failure to post and serve notices with respect to those trains (which are operated by L&N, not C&EI, and which run from St. Louis, Missouri to Atlanta, Georgia, connecting with C&EI's trains at Evansville) deprived the Commission of jurisdiction.[5] In accordance with its con-

[5] The connecting St. Louis-Atlanta L&N trains are not involved in this proceeding and are still in operation.

sistent interpretation of Section 13a(1), *Missouri Pac. R. Co. Discontinuance of Trains*, 320 I.C.C. 383, 385 (1964); *Southern Pac. Co. Discontinuance of Trains*, 317 I.C.C. 519, 520-22 (1962); *Chicago & E. I. R. Co. Discontinuance of Trains*, 331 I.C.C. 447, 448 (1968); 49 C.F.R. §§1122.5(e), 1122.5(j) (1970 Ed.), the Commission rejected the argument. Undaunted, appellees pressed their point before the District Court—apparently adding still another set of trains (those involved in the L&N case), which do not even intersect with C&EI's Chicago-Evansville trains.[6] More than two years after the Commission decided the case, and without once confronting the merits of its decision, appellees succeeded.

The District Court's order, barren of any indication of how it arrived at its conclusion or of what might constitute "sufficient" notice, is an open invitation to future technical afterthoughts in this and other cases. Even in this case, the confusion foreshadowed by the court's ruling is obvious from appellees' own apparent inability to decide whether notice should have been given on L&N's connecting trains only,[7] on those trains and on L&N's Cincinnati-New Orleans trains as well,[8] throughout "the entire complex of passenger operations centering at Evansville and

---

[6] See note 8 and accompanying text, *infra*. A map showing the routes of the various trains in question is attached hereto as Appendix F.

[7] Memorandum in Support of Motion for Summary Judgment, pp. 6, 9.

[8] This is the import of appellees' insistence (and the court's ruling) that the C&EI and L&N cases should be consolidated and that remand of one requires remand of the other. But neither appellees' briefs and arguments on their motion for summary judgment, nor the District Court's orders, directly confront the question. Appellees' complaint, moreover, did not suggest that notice should have been posted on the Cincinnati-New Orleans trains.

at Nashville,"[9] or—as hinted in the District Court's second order (Appendix B, p. 7a)—"from Chicago to and throughout the Southeastern part of the United States." Certainly the District Court offers no guidance. The only two criteria it suggests (Appendix B, p. 7a), without indicating their source, are "vital interest" on the part of potential protestants (or "the general public interest"), and whether a given passenger service is "interwoven and entwined" between "various railroads"—tests so vague as to be meaningless.

Obviously, the question of what constitutes proper statutory notice arises in every Section 13a(1) proceeding. Since virtually every train provides connecting service with one or more other trains (not infrequently switching cars from one to another), if appellees' theories are accepted it will be a rare case in which objectors cannot raise a claim of defective notice. By rejecting the Commission's consistent interpretation of Section 13a(1) and by failing to articulate the standards for its decision or to fill the interpretative vacuum that decision creates, the District Court has fostered uncertainty and encouraged useless litigation, unrelated to the merits, in almost every Section 13a(1) case. These difficulties are reinforced by the court's failure to consider whether the allegedly defective notice prejudiced any party or in any sense affected the Commission's resolution of the real statutory issue (the balance between public need for, and burdensome operation of, the trains). The court's decision, by exalting form over substance and leaving the meaning of a crucial provision of Section 13a(1) unsettled, can only serve to retard the purposes of the Interstate Commerce Act.

---

[9] Petition for Reconsideration, p. 4.

II.

The Decision of the District Court, However Interpreted, Is Wrong On The Merits.

It is elementary that the Commission's consistent interpretation of technical provisions of statutes it administers is entitled to great weight. Yet the District Court summarily overturned the Commission's consistent interpretation of Section 13a(1), giving no reasons and offering no alternative. It would seem, indeed, that the court simply substituted its own judgment for the Commission's as to the meaning of "train" in the Section 13a(1) notice requirements. That alone requires reversal. *Shields* v. *Utah Idaho Cent. R.R.*, 305 U.S. 177, 180-82, 185 (1938); *Nat'l Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944); *Bass* v. *United States*, 163 F. Supp. 1, 4 (W.D. Va. 1958), *aff'd*, 358 U.S. 333 (1959).

A cursory inquiry, moreover, shows that the Commission's interpretation was right. Almost any Section 13a(1) case will involve connecting trains, operated under a wide variety of inter-railroad connecting service arrangements which often differ from each other only in highly technical details. Section 13a(1) itself does not speak to such arrangements, calling for notice only in "each state in which such train . . . is operated" and at "every station, depot or other facility served thereby." To the Commission, then, fell the task of regulation and interpretation. It chose to avoid entanglement in a morass of technicalities by requiring notice at all points on the carrier's own lines served by the train,[10] and—going beyond the bare language

---

[10] This accords with the judicial interpretation of "served" in other contexts. Chicago & E. Ill. R.R. v. Illinois Cent. R.R., 261 F. Supp. 289, 299-301 (N.D. Ill. 1966); State of Georgia v. United States, 156 F. Supp. 711, 718 (N.D. Ga. 1957), *aff'd*, 356 U.S. 273 (1958).

of Section 13a(1)—to ensure notice to connecting as well as local passengers by requiring posting in each passenger car of the train to be discontinued, 49 C.F.R. §1122.5(j) (1970 Ed.). These rules are clear, comprehensible, calculated to provide actual notice, and easy to apply. But the District Court's interpretation (of which we know only that it sometimes requires notice somewhere beyond the carrier's own lines) upsets these rules, the product of the Commission's expert judgment, in favor of what can only become a wilderness of ex post facto case-by-case applications, turning on technicalities neither contemplated by Section 13a(1) nor required by the national transportation policy and leading to great uncertainty in the interpretation of the statute.

Finally, the District Court's summary reversal of the Commission's orders is unjustifiable, even if C&EI's notice was somehow insufficient and the court within the bounds of judicial review in so deciding. It is basic that Commission orders may not be upset unless unsupported by substantial evidence (as to which the burden of proof is upon the party complaining of the order) and that a reviewing court may not weigh the evidence. *Virginian Ry.* v. *United States*, 272 U.S. 658, 663 (1926); *Illinois Cent. R.R.* v. *United States*, 263 F. Supp. 421, 430 (N.D. Ill. 1966), *aff'd*, 385 U.S. 457 (1967). At no time did the District Court suggest that the Commission's orders were not supported by substantial evidence; indeed, at the court's sole hearing all parties agreed that the merits of those orders were not before it.[11] Yet it summarily vacated those orders.

Its sole reason for doing so—C&EI's allegedly insufficient notice—cannot support that result. For the court,

---

[11] Transcript of Proceedings, November 4, 1968, pp. 26, 43, 46, 57. Appellees persistently urged the court to avoid considering the merits. See Motion for Separate Trials of Certain Issues and Memorandum in Support thereof, both filed with the Complaint.

quite correctly, rejected appellees' contention that the asserted insufficiency was a jurisdictional defect. Its orders nowhere mention jurisdiction, and it remanded the case to the Commission for "further proceedings," not, as appellees urged, with instructions to dismiss for want of jurisdiction. Indeed, it could hardly have done otherwise. Section 13a(1) provides that a carrier seeking discontinuance

> . . . may, but shall not be required to, *file with the Commission*, and upon such filing . . . *mail* to the Governor of each State in which such train . . . is operated, and *post* in every station, depot, or other facility served thereby, notice. . . . The carrier or carriers *filing* such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission. . . . Upon the *filing* of such notice the Commission shall have authority . . . to enter upon an investigation. . . . The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body . . . unless notice as in this paragraph provided is *filed with the Commission*. . . . (Emphasis added.)

Regardless of the question whether a particular notice is sufficient, this language makes it clear that the only "jurisdictional" notice is that which must be "filed with the Commission." On that notice, not on the notice "mailed" to Governors and "posted" in train stations, depends the Commission's jurisdiction, the supersession of State law, and the effectiveness of discontinuance. The legislative history of the statute—particularly the rejection by the House and the Conference Committee of the Senate's language[12] making mailing and posting, as well as filing, jurisdictional—supports this conclusion.

The District Court's decision, then, rests neither upon jurisdictional grounds nor upon the merits of the Com-

[12] See 104 Cong. Rec. 10861, 12560 (1958).

mission's orders. In reason, the only remaining basis for its summary reversal of those orders would be a finding that C&EI's allegedly insufficient notice prejudiced some or all of the parties. But such a finding requires a showing that interested parties were unaware of the Commission proceeding and thus denied an opportunity to participate therein, and at least some indication that the Commission was thereby prevented from receiving relevant evidence which might have affected its decision on the merits. *State of Montana* v. *United States*, 202 F. Supp. 660, 662 (D. Mont. 1962); *McCracken* v. *United States*, 47 F. Supp. 444, 446 (D. Ore. 1942); *State of New York* v. *United States*, 299 F. Supp. 989, 997 (N.D. N.Y. 1969), *aff'd*, 396 U.S. 281 (1970). The District Court made no such findings. It could not have done so without inquiring into the merits of the Commission's orders, which it did not do; the record, moreover, flatly negatives any finding of prejudice. Virtually all of the parties before the court appeared before the Commission, and no party has alleged that it did not have actual knowledge of the Commission proceedings, that any lack of formal notice caused it prejudice, or that the Commission did not receive and consider all relevant evidence. Whether the issue be "prejudice" or "substantial evidence," therefore, both the statute, 28 U.S.C. §2325, and this Court's decisions, *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, 136-38 (1947), unavoidably required the District Court on these facts to "hear and determine" the merits of the Commission's orders before overturning them. That it did not do.

Conclusion

The questions presented are substantial and of great importance to the proper application of Section 13a(1) and the proper functioning of the machinery for judicial review of Interstate Commerce Commission orders. For the reasons given herein, probable jurisdiction should be noted and the judgment below reversed.

Respectfully submitted,

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
KEITH F. BODE
PETER A. FLYNN
Attorneys for Appellant
Chicago & Eastern Illinois
Railroad Company

135 South LaSalle Street
Chicago, Illinois 60603

July 15, 1970